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Supreme Court, U.S.
FILED
MAY 26 1998
CLERK

No. 97-7213

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SYLVESTER MOSLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari in the
United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN NEW JERSEY

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I. INTEREST OF THE AMICUS CURIAE

The Association of Criminal Defense Lawyers of New Jersey has a membership of approximately 550 members who practice criminal defense throughout the State of New Jersey. Many of our members appear regularly, if not exclusively, before the United States District Court. The pending writ raises an important question on the parameters of Federal Rule of Criminal Procedure 31(c) regarding the limitations of a lesser included offense and the structure of Title 18 United States Code § 2113 defining bank robbery and its incidental crimes. This Association chooses very carefully the cases in which it seeks to appear as amicus curiae. It is the belief of the Association that the instant issue is crucial to the rights of criminal defendants and to the fair administration of justice.[1]

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1. Neither counsel for the respective parties authored this brief in whole or in part and no person or entity, other than the amicus curiae, made any monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

The elements of the crime of bank larceny embodied in Title 18 United States Code § 2113(b) are a subset of the elements of the bank robbery statute of Title 18 United States Code § 2113(a). The bank larceny statute does not require any additional element than the bank robbery crime. Therefore, precedent from this Court makes clear that bank larceny is a lesser included offense of bank robbery and an instruction for larceny should have been offered the jury in this matter pursuant to Federal Rule of Criminal Procedure 31(c).

A comparison of the two statutes makes clear that the only difference between bank robbery and bank larceny is the use of force and violence or intimidation in the robbery context. Of course, the Court below found that the larceny provision had an "intent to steal or purloin" element that was missing in the robbery statute. It is true that a plain reading of the robbery statute does not show such an intent phrase. But it is evident from a review of the common law and the legislative history of both provisions that such intent can be plainly inferred. The historical requirements of the two crimes and the manner in which Congress formulated them evidence such an intent element in bank robbery.

Landmark cases from this Court lend support to this position. In Morissette v. United States, 342 U.S. 246 (1952) this Court reviewed common law and legislative history in determining that the theft statute of Title 18 United States Code § 641 had an inferred felonious intent element. A review of the common law and legislative history of Title 18 United States Code § 2113 was undertaken by this Court in Prince v. United States, 352 U.S. 322 (1957). When this Court engaged in a comparison of the elements of bank robbery and entering a bank to commit a felony, the conclusion was that the intent to steal element of the entering crime "merges into the completed crime if the robbery is consummated." Id. at 328. These cases indicate that an intent to steal element can be inferred in the bank robbery provision of Title 18 United States Code § 2113(a).

Bank larceny should be considered a lesser-included offense of bank robbery.

III. ARGUMENT

THE BANK LARCENY PROVISION OF TITLE 18 UNITED STATES CODE § 2113(b) IS A LESSER-INCLUDED OFFENSE OF THE CRIME OF BANK ROBBERY IN § 2113(a) PURSUANT TO THE TEXTUAL ELEMENTS TEST.

Federal Rule of Criminal Procedure 31(c) allows for a defendant to "be found guilty of an offense necessarily included in the offense charged." Such provision enables a jury to have a less serious alternative when the jury suspects the defendant guilty of some offense, but is uncertain about the proofs regarding the charged offense. This Court noted in Spaziano v. Florida, 468 U.S. 447, 455 (1984) that the "absence of a lesser included offense instruction increases the risk that the jury will convict simply to avoid setting the defendant free." The instant matter may have realized such an unfair result by not offering the jury the opportunity to consider the lesser-included offense of bank larceny, rather than simply the charged offense of bank robbery. The elements test enunciated in Schmuck v. United States, 489 U.S. 705 (1989) is clearly satisfied when analyzing the respective provisions of bank robbery in Title 18 United States Code § 2113(a) and bank larceny in § 2113(b). Therefore, it was error for the

District Court to refuse to offer the jury the alternative and lesser-included offense of bank larceny.

This Court in Schmuck announced a clear approach in applying Federal Rule of Criminal Procedure 31(c):

> . . . one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

Id. at 716. This Court drew support for the elements test from the language of Rule 31(c) which suggests that the comparison of offenses should be "conducted by reference to the statutory elements of the offenses in question . . ." Id. at 716. Such an approach "involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial." Id. at 720. The elements test also promotes judicial economy because appellate review can be conducted without the need for the entire evidentiary record. Id. at 720-721.

A lesser-included instruction is only proper when the greater offense charged requires the jury to find a disputed factual element which need not be shown for conviction of the lesser-included offense. Keeble v. United States, 412 U.S. 205, 208 (1973). Clearly, a review of the provisions of § 2113(a) and (b) suggests that the greater offense of bank robbery contains an element of force or intimidation that does not exist for the crime of bank larceny. The position taken by the Third Circuit below in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997) incorrectly suggests that bank larceny is not a lesser-included offense of bank robbery because larceny requires an element of "intent to steal or purloin" that is not required for bank robbery. Id. at 204. Essentially, the Third Circuit believed that the intent to steal element was irrelevant for bank robbery purposes because "the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes" quoting from United States v. Brown, 547 F.2d 36, 39 (3d Cir. 1976). The Mosley Court took support for its position from the Tenth Circuit in United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) which found no indication in the legislative history that Congress intended § 2113(a) to contain an "intent to steal" element identical to § 2113(b). 41 F.3d at 1413.

Clearly, such rationale for not finding bank larceny a lesser-included offense of bank robbery is faulty. While it is correct that the essence of bank robbery is the person's resort to force or intimidation, it must also be recognized that such action must be undertaken with the intent to take from the person or presence of another something of value. Robbery can be viewed as larceny from the person plus force or intimidation. The legislative history argument also fails to recognize some basic facts. When Congress added the bank larceny provision in 1937 to support the bank robbery statute passed three years earlier, it explicitly titled the Act "To amend the bank - robbery statute to include burglary and larceny." Act of Aug. 24, 1937, ch. 747, 50 Stat 749. Such title suggests that Congress was viewing this new larceny provision as being included within the parameters of the robbery statute. Likewise, the present heading given by Congress in § 2113 provides some further insight into the legislative thinking - "Bank robbery and incidental crimes".

The original bank robbery statute passed in 1934 was codified in Title 12 United States Code § 588(b) and explicitly required that a conviction could only result if a person "feloniously takes, or feloniously attempts to take . . ." Such requirement was not altered in any way when the robbery statute was amended in 1937 to include the larceny offense within

the same section. However, when the federal criminal code was revised and codified in 1948, the provisions were altered somewhat. The "feloniously" phrase was deleted from the robbery crime and the larceny offense was given its own section, such that robbery and larceny were respectively codified at Title 18 United States Code § 2113(a) and (b).

Apparently, the Third Circuit in Mosley notes the deletion of the term "feloniously" as "support for the proposition that intent was not conceived as an element of the crime" because Congress failed "to give some indication that intent was to remain an element of bank robbery." 126 F.3d at 205. Such rationale seems misplaced when this Court's decision in Prince v. United States, 352 U.S. 322 (1957) is considered. This Court reviewed the legislative history of bank robbery in 18 U.S.C. § 2113(a) and explained:

> . . . The statute in its present form was enacted by the June 1948 revision . . . The legislative history indicates that no substantial change was made in the revision. It segregated the larceny provision in § 2113(b), leaving robbery and unlawful entry in § 2113(a).

352 U.S. at 326 n. 5. Such deletion of the term "feloniously" was not deemed by this Court to be a "substantial change" because the element of an intent to steal can clearly be inferred. The Third Circuit below even recognized that the deletion of "feloniously" was "a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U.S.C. § 1 (repealed)." 126 F.3d at 205.

This Court spoke eloquently regarding the inference of intent in criminal statutes in the landmark case of Morissette v. United States, 342 U.S. 246 (1952). Though the case may have begun as "profoundly insignificant" it resulted in answering questions "both fundamental and far-reaching in federal criminal law." Id. at 247. Though the defense had argued that the taking of spent bomb casings from federal property required felonious intent, the trial court had ruled that the provision for theft codified in 18 U.S.C § 641 required no element of criminal intent. However, this Court found such element of intent inferred:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as unequivocal and persistent in mature systems of law as

> belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250. The crimes of stealing and larceny and its variants were viewed as among the earliest offenses known to the law that existed before legislation and that :

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.

342 U.S. at 262. This Court in Morissette held that the mere omission from the explicit language of § 641 of any intent element could not be construed as the elimination of that element:

> . . . where Congress borrows terms of art in which are accumulated the legal

> tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

342 U.S. at 263. The Court noted that its attention had not been directed to "any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law." Id. at 265.

Congress did not expressly eliminate the mental elements of intent in the bank robbery provision of 18 U.S.C. § 2113(a). When it initially enacted the robbery statute in 1934, Congress included the term "feloniously." The term remained when larceny was included in the robbery provision in 1937. When Congress revised and codified the federal criminal statutes in 1948, the term "feloniously" was removed. Such deletion was undertaken to remove the countless references to"felonies" and "misdemeanors" that had previously existed in the criminal code. It was not done to radically change the crime of robbery from that generally accepted from common law. This Court in Prince and Morissette seemingly support that view.

Prince v. United States, 352 U.S. 322 (1957) involved an individual charged and convicted of bank robbery and also the entering of a bank with the intent to commit a felony. A sentence of twenty years was imposed on the bank robbery and fifteen years given for the entering of the bank to be served consecutively. This Court held that such sentence was illegal and that the defendant should be sentenced only on the bank robbery charge. The Prince Court believed that § 2113 "creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws." Id. at 323. The 1937 amendment to the statute was apparently proposed by the Attorney General in a letter to Congress:

> The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties.

352 U.S. at 327. This Court engaged in an elements test of bank robbery and entering a bank to commit a felony and concluded that the heart of the crime of

entering a bank to commit a crime is the intent to steal and that such "mental element merges into the completed crime if the robbery is consummated." Id. at 328. What better indication can be offered to show that this Court has previously opined that the crime of bank robbery has an intent to steal embodied in it?

Further analysis of the bank robbery statute was offered by this Court in Heflin v. United States, 358 U.S. 415 (1959) when § 2113(c) was deemed to have been designed to provide punishment for those who receive the money from the robbery and not to increase the punishment for the individual who actually robbed the bank. Support for such view was obtained from the Senate Report on the Act which had been captioned "Punishment for Receivers of Loot From Bank Robbers." Similar support for the instant petitioner's claim can be had from the caption of the 1937 Act creating the bank larceny offense - "An Act to amend the bank - robbery statute to include burglary and larceny." The procedural history of the Heflin matter had begun when the District Court had given consecutive sentences for violations of § 2113(a), (b), (c), (d) and conspiracy to violate the above sections and the Fifth Circuit reversed for resentencing. See Heflin v. United States, 223 F.2d 371 (5th Cir. 1955). The Fifth Circuit believed that " . . 18 U.S.C.A. § 2113 (a), (b), and (d) have been construed not as creating separate offenses, but only

as creating different maximum punishments for a single offense depending on the existence of aggravating circumstances." Id. at 376. The violations of § 2113(a) and § 2113(b) became merged into the conviction under § 2113(d).

More recently, in Rutledge v. United States, 116 S. Ct. 1241 (1996) this Court looked to common law to explain that where two statutory provisions proscribe the same offense, it can be presumed that the legislature did not intend to impose two punishments for that offense. The District Court had imposed concurrent life sentences for drug conspiracy in violation of 21 U.S.C. § 846 and for engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, as well as a $50 special assessment on each count. But this Court concluded that the "in concert" element of a § 848 offense "necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846; conspiracy is therefore a lesser included offense of CCE." Id. at 1250. The same argument holds true in the instant matter. A finding of guilt on bank robbery necessarily includes a finding that the person participated in a larceny of a bank.

Most of the federal Circuit Courts that have considered this issue agree with the petitioner. The Fourth Circuit has consistently supported the

petitioner's position. In United States v. Carter, 540 F.2d 753 (4th Cir. 1976) the Court explained that

> Bank robbery and bank larceny are very similar crimes. Larceny, in fact, is generally regarded as necessarily included offense in the crime of robbery ' . . . It is impossible to commit robbery without having first committed larceny'.

540 F.2d at 754(citations omitted). The Circuit reversed and remanded the defendant's bank robbery conviction based on the District Court's failure to instruct the jury on the lesser-included offense of bank larceny. Later, in United States v. Amos, 566 F.2d 899 (4th Cir. 1977) the Court held that a bank larceny conviction merges into a bank robbery conviction because a conviction for a less aggravating form of bank theft merges into a conviction for a more aggravating form of bank robbery. More recently, in United States v. Walker, 75 F.3d 178 (4th Cir. 1996) the Court reaffirmed its view that bank larceny is a lesser-included offense of bank robbery by concluding that the element distinguishing the crimes is the use of force and violence or intimidation to complete the crime. Such view is shared by the Eighth Circuit in

United States v. Cady, 495 F.2d 742, 748 (8th Cir. 1974) when the Court explained that the "difference between the proof of robbery (subsection (a)) and larceny (subsection (b)) is in the taking by force and violence, or by intimidation required in the case of robbery." United States v. Cornillie, 92 F.3d 1108, 1109 (11th Cir. 1996) and United States v. Sandles, 80 F.3d 1145 (7th Cir. 1996) also stand for the proposition that bank larceny only lacks the essential elements of force or intimidation to be a robbery. See also United States v. Perry, 991 F.2d 304, 311 (6th Cir. 1993) and United States v. Henson, 945 F.2d 430, 440 (lst Cir. 1991). In a case interpreting the District of Columbia criminal code, Walker v. United States, 418 F.2d 1116 (D.C. Cir. 1969) indicated that larceny is a lesser included offense of robbery.

The Third Circuit below cites United States v. Gregory, 891 F.2d 732 (9th Cir. 1989) to rebut the weight of authority. The Ninth Circuit looks at the respective statutes and finds that bank larceny is not necessarily included as a lesser offense in bank robbery because larceny "contains specific intent element which need not be proved in the bank robbery context." Id. at 734. No further analysis is offered by the Court. Significantly, the Court below looked to the analysis of the Tenth Circuit in United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) for support even though precedent from the Circuit ultimately

requires the Brittain panel to find that bank larceny is a lesser-included offense of bank robbery.

The rationale offered by the Court below in reliance on the Brittain case shows the faulty analysis. Initially, the Brittain Court looked to the plain language of § 2113(a) and (b) and obviously observes that the bank robbery provisions of §2113(a) contains no language like "with intent to steal or purloin." Id. at 1413. Then, the Court states that there is nothing in the legislative history to specifically indicate that Congress intended § 2113(a) to contain an 'intent to steal' element identical to § 2113(b), but proceeds to offer analysis to seemingly rebut such position. Id. at 1413-1414. It notes that "the fact that robbery and larceny were offenses at common law, it might be argued that Congress intended to incorporate into § 2113 the intent element required for the offenses at common law." Id. at 1413. The Tenth Circuit also recognized that the term "feloniously" that was contained in the first two forms of the bank robbery statute in 1934 and 1937 "could have been interpreted as requiring an intent to steal; Courts have often construed the phrase 'felonious taking' in robbery statutes in such a fashion." Id. at 1413. Further, the Brittain Court must concede that:

> it seems likely that the deletion of 'feloniously' was simply a result of

> Congress' effort to remove references to felonies and misdemeanors from the code; such terms were considered redundant in light of a specific definition of those terms provided in 18 U.S.C. § 1.

41 F.3d at 1414. Such analysis of the legislative history seems to support the argument that Congress intended an intent to steal element in the bank robbery statute. Substantial reliance by the Court below on such a case shows the weakness of the position taken by the Third Circuit.

It seems clear that the petitioner was denied his right to a fair trial in the instant matter by the District Court's refusal to instruct the jury on the lesser included offense of bank larceny. The dictates of Federal Rule of Criminal Procedure 31(c) were not followed.

IV. CONCLUSION

It is respectfully requested that the judgment in the instant matter be reversed and the matter be remanded to the District Court for the purpose of a new trial.

Respectfully submitted,

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